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Supreme Court, U.S.
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No. 07-858

In The

Supreme Court of the United States

Everardo Silva Ceja,

Petitioner

v.

The United States of America,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Roger T. Nuttall
Counsel of Record
Nuttall & Coleman
2445 Capitol St., Suite 150
Fresno, California 93721
(559) 233-2900

QUESTIONS PRESENTED

Whether a cursory reference to a police report, in the absence of any factual discussion, made during a plea colloquy, is sufficient to warrant application of the Armed Career Criminal Act's sentencing enhancements?

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Petitioner, Everardo Silva Ceja, respectfully prays that a writ of certiorari issue to review the judgment below.

This petition is timely filed pursuant to *Union Nat'l Bank v. Lamb*, 337 U.S. 38 (1949), which authorizes filing of a petition for writ of certiorari "on the next day which is not a Sunday or legal holiday" when the due date falls on such a day. *Id.*, at 40. The order denying the petition for rehearing was filed on August 7, 2007, therefore, the due date to file the instant petition is Saturday, November 5, 2007.

OPINIONS BELOW

The unpublished memorandum of the United States Court Of Appeals for the Ninth Circuit, the highest federal court to review the merits, appears at Appendix A to the petition and is reported at 234 Fed. Appx. 742.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on July 2, 2007. A request for panel rehearing was denied on August 7, 2007. A copy of the Ninth Circuit Court of Appeals' decision appears at Appendix A and a copy of its order denying rehearing appears at Appendix B.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

"No person shall be... deprived of life, liberty, or property, without due process of law..." *U.S. Const., amend. V.*

18 U.S.C. § 924(e) states:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(e)(2) As used in this subsection -

(A) the term "serious drug offense" means

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.) for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for

which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that -

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

California Penal Code section 243(c) provides, in pertinent part:

When a battery is committed against a[n] officer engaged in the performance of his or her duties, whether on or off duty..., and the person committing the offense knows or reasonably should know that the victim is [an] officer, and an injury is inflicted on that victim, the battery is punishable by a fine..., by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, or by imprisonment in the state prison for 16 months, or two or three years.

STATEMENT OF THE CASE

On April 3, 2003, an Indictment was filed in the United States District Court for the Eastern District in Fresno, California, charging Petitioner with a single count of being a felon in possession of a firearm and ammunition (18 U.S.C.A. § 922(g)(1)), to wit: a Jennings, model 38, .380 caliber semi-automatic pistol, and Winchester .380 caliber ammunition, on or about October 23, 2001. It was further alleged that Petitioner had been previously convicted, in Fresno County Superior Court, in the State of California, of the following (1) discharging a firearm at an occupied dwelling (Cal. Pen. Code, § 246) on July 8, 1993; (2) felony spousal abuse (Cal. Pen. Code, § 273.5) on October 16, 1997; and (3) felony battery on a peace officer (Cal. Pen. Code, § 243(c)) on December 10, 1998. (SER Tab 1.)[1] [2]

On November 26, 2003, Petitioner pled guilty to the Indictment pursuant to a Plea Agreement. (SER Tab 3.)

Thereafter, prior to sentencing, Petitioner challenged the application of the ACCA to enhance his sentence in the instant matter, and in the alternative, sought to withdraw his plea. (ER 00011-00020.) The government filed responses in opposition. (ER 00053-00059, see also SER Tab 5; SER Tab 7.) Petitioner filed supplemental points and authorities (ER00060-64), and the government filed its opposition (SER Tab 6).

The motion to strike the application of the

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1. "ER" and "SER" refer, respectively, to the Excerpts of Record and Supplemental Excerpt of Record filed in the United States Court of Appeals for the Ninth Circuit.

2. The facts of this offense are more fully set forth in Exhibit A to Supplemental Excerpt of Record 7.

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF FRESNO) SS.

I am employed in the County of Fresno, State of California. I am over the age of 18 and not a party to the within action. My business address is 2445 Capitol Street, Suite 150, Fresno, California, 93721. On October 31, 2007, I served the foregoing document described as: *corrected* PETITION FOR WRIT OF CERTIORARI, on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail at Fresno, California, addressed as follows:

DAWRENCE W. RICE, JR., ESQ.
Assistant U.S. Attorneys
U.S. Attorney's Office
2500 Tulare Street, Suite 4-401
Fresno, California 93721

Courtesy Copy:
The Honorable OLIVER W. WANGER
Judge, U.S. District Court
2500 Tulare Street, Suite 1501
Dept. 3
Fresno, California 93721

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 18, 2007, at Fresno, California.

ROGER T. NUTTALL

CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR WRIT OF CERTIORARI uses a 12 point Century font and contains 1,899 words, including tables.

Dated: December 18, 2007.

Respectfully submitted,

NUTTALL & COLEMAN

ROGER T. NUTTALL
Counsel for Petitioner
EVERARDO SILVA CEJA

ACCA, or in the alternative to withdraw the plea, was argued on November 16, 2005. (SER Tab 9.) However, on November 22, 2005, Petitioner withdraw the motion to withdraw the plea. (SER Tab 10 at 3-4.) Thereafter, Petitioner was sentenced to a term of 180 months. (SER Tab 11; see also SER Tab 10 at 22.)

On November 29, 2005, Petitioner filed a Notice of Appeal. (SER TAB 12.) Petitioner's opening brief was filed on December 13, 2006, in the United States Court of Appeals for the Ninth Circuit, case number 05-10783. Petitioner's amended brief was filed January 9, 2007. The government filed its brief in response on February 15, 2007. Petitioner's reply brief was filed May 2, 2007.

On June 12, 2007, oral argument was given. Thereafter, on July 2, 2007, the Ninth Circuit issued its unpublished memorandum wherein the sentence was affirmed in its entirety.

On July 16, 2007, Petitioner filed a Petition for Rehearing. On August 7, 2007, the petition was denied.

REASONS FOR GRANTING THE WRIT

This matter presents an important question of federal law because this case and others like it present a compelling reason for this Court to specifically address the impropriety of a sentencing court's use of a cursory plea colloquy when determining whether prior convictions implicate a sentencing enhancement pursuant to the ACCA.

In *Shepard v. United States*, 544 U.S. 13, 20-21 (2005), this Court held that sentencing courts may properly consider documents that a defendant adopts as the factual basis for his plea. More particularly, "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge

and defendant in which the factual basis for the plea was confirmed by the defendant..." *Id.* at 26. Yet when a sentencing court moves to enhance a defendant's sentence pursuant to the ACCA, and considers a prior conviction based upon a plea, wherein the only factual recitation involves the defendant agreeing that were the trial court to read the police report it would believe the facts stated therein to be true, this cursory inquiry by the trial court taking a defendant's guilty plea is insufficient to later justify significant penalty enhancements such as those called for by the ACCA.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court prohibited judges from "mak[ing] a finding that raises [a defendant's] sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant." *United States v. Booker*, 543 U.S. 220, 317-318 (2005) (Thomas, J., dissenting in part). Yet by allowing a sentencing court to rely upon a plea colloquy that merely involves the defendant agreeing that if the trial court were to read the police report it would believe the crime or crimes alleged had been committed allows precisely that which *Apprendi* prohibits.[3]

In this case, the trial court's question during the plea colloquy of December 10, 1998, did not explicitly ask whether the facts contained therein were true and accurate, nor did the court reference any single fact contained in the report. Rather, the trial court's question related to whether or not, if it were to "read the police reports," the court "would believe" defendant "committed the crime." This is very different than

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3. More particularly, the court inquired, "You're stipulating to a factual basis and agreeing if I read the police reports, I would believe you committed this crime; is that correct" Ceja answered, "Yes." (ER 91-92.)

establishing the facts of the crime itself, or even asking whether all the fact contained in the police report are true.

"Other than the fact of a prior conviction, any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, at 490; *Booker*, at 244. The fact *of* a prior conviction is different than the facts *that relate to* that prior conviction. There are any number of reasons a defendant may plead guilty to a crime that is not accurately portrayed by the police report.

Moreover, if a district court may not consider police reports or complaint applications when making its determination regarding a qualifying predicate offense, common sense dictates that relying on those same police reports, and nothing more, during the earlier plea colloquy is insufficient to warrant the significant enhancements required by the ACCA.

CONCLUSION

Petitioner respectfully requests this Court grant the writ of certiorari as the question presented herein is an important question of federal law.

DATED: December 18, 2007

Respectfully submitted,
NUTTALL & COLEMAN

ROGER T. NUTTALL
Counsel for Petitioner
Everardo Silva Ceja

APPENDIX A - JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JULY 2, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

vs.

EVERARDO CEJA

MEMORANDUM

Case No. 05-10783
D.C. No. CR-03-05144-OWW

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted June 12, 2007
San Francisco, California

Before SCHROEDER, Chief Circuit Judge, CANBY and FERNANDEZ, Circuit Judges.

Appellant, Everardo Ceja, was convicted of being a felon in possession of a firearm. He appeals his mandatory 15 year sentence under the Armed Career Criminal Act, 18 U.S.C. §924(e), challenging the sentencing court's determination that he has three prior convictions that qualify as violent felonies.
We affirm.

One of the convictions was for spousal abuse. The relevant California statute required "wilful conduct" that results in a "traumatic condition," which is defined to include external or internal injuries caused by physical force. Cal. Penal Code § 273.5(a),(c). Given § 273.5's clear requirement that the use of force be established to convict, this conviction categorically qualifies as a violent felony under the ACCA. 18 U.S.C. § 924(e)(2)(B)(I).

A second conviction was for shooting at an occupied vehicle. Here the appellant contends that he was not the shooter. This amounts to a collateral attack on the validity of the state conviction which is not appropriate as a part of federal sentencing. See Custis v. United States, 511 U.S. 485, 487 (1994).

The third conviction was for battery on a peace officer under Cal. Penal Code § 243(c). In the California state court, according to a transcript of the plea coloquy, Ceja stipulated that the police report would provide a factual basis for his guilty plea to battery on a police officer. Ceja contends that the federal sentencing court, in determining that his battery conviction was a violent felony, improperly considered the police report. The Supreme Court, however, has held that sentencing courts may properly consider documents that a defendant adopts as the factual basis for his plea. Sheppard v. United States, 544 U.S. 13, 20-21 (2005); see also United States v. Espinoza-Cano, 456 F.3d 1126, 1132 (9th Cir. 2006). The Stipulation therefore constituted a sufficient factual basis for the conviction.

Ceja also contends that the facts contained in the report do not establish that he committed a violent felony within the meaning of the ACCA. The facts, however, show that he endeavored to escape from police officers' attempts to arrest him in his bedroom. He thus

resisted the arrest, and when the police officers blocked his exit from the room by physically tackling him, a fight ensued that resulted in actual injury to three of the officers. Although the government is incorrect in contending that the California statute is categorically a violent felony, under the modified categorical approach, the matters to which the defendant stipulated in state court are sufficient to establish that Ceja was convicted for conduct that involves the "use of force" and hence amounted to a violent felony within the meaning of the ACCA. See United States v. Hernandez-Hernandez 431 F.3d 1212, 1218 (9th Cir. 2005) (holding that facts showing that the defendant attempted to "forcibly" extract the victim from her van established the "use of force"); cf. United States v. Savage, No. 0630451, slip op. 7153, 7161-62 (9th Cir. June 12, 2007) (holding that escape from a jail type facility established a "serious potential risk of physical injury to another' and thus established a crime of violence). The sentence therefore is affirmed.

AFFIRMED.

APPENDIX B - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AUGUST 7, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

vs.

EVERARDO CEJA

ORDER

Case No. 05-10783
D.C. No. CR-03-05144-OWW

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Before SCHROEDER, Chief Circuit Judge, CANBY and FERNANDEZ, Circuit Judges.

The petition for panel rehearing is denied.